STATE OF MICHIGAN
IN THE SUPREME COURT

KEVIN SMITH,

Plaintiff-Appellant,

v.

CITY OF FLINT, a municipal corporation,

Defendant-Appellee.

/

Supreme Court No. 152844
Court of Appeals No. 320437
Trial Court No. 13-100532-CZ

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DEFENDANT-APPELLEE'S RESPONSE BRIEF IN OPPOSITION TO PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTIONS PRESENTED

1. Has the Plaintiff-Appellant stated a claim that he suffered discrimination regarding his terms, conditions, location, or privileges of employment?

Defendant-Appellee answers:	**"NO"**
Plaintiff-Appellant answers:	**"Yes"**
Trial Court answered:	**"NO"**
Court of Appeals answered:	**"NO"**

STATEMENT OF JURISDICTION

Defendant-Appellee agrees with Plaintiff-Appellant that this Court has jurisdiction to consider the application for leave to appeal.

TABLE OF AUTHORITIES

SUMMARY OF THE ARGUMENT

Plaintiff-Appellant, Kevin Smith sued Defendant-Appellee, City of Flint alleging that the City took a so-called adverse employment action against him in retaliation for protected activity under the Whistleblower Protection Act, thereby violating the Act. The so-called "adverse action" Mr. Smith received was a reassignment to patrol duties in the northern end of the City of Flint. The City argued this reassignment was not an adverse employment action under the WPA and sought summary disposition. The Trial Court agreed with the City, and the Court of Appeals denied Mr. Smith leave to appeal. Then, Mr. Smith appealed to this Court, and in lieu of granting leave, ordered the Court of Appeals to decide whether the City took an adverse employment action against Mr. Smith. After briefing and oral arguments, the Court of Appeals agreed that the City had not. Because that decision was correct on the merits, this Court should deny leave to appeal.

The Whistleblower Protection Act provides employees limited protection from certain actions by their employer if they engage in protected whistleblower activity. Stated another way - if an employee engages in protected activity, there are certain employment decisions, which are limited in scope, that an employer cannot take as it relates to that employee – if they are as a result of the protected activity. However, this does not mean that the Employer is precluded from making *any* employment decision, which the employee might subjectively consider adverse. In fact, a plaintiff must show that an employment decision is materially adverse - the plaintiff's subjective feelings about the action are irrelevant.

The Court of Appeals correctly recognized this managerial discretion, and determined that Mr. Smith failed to state a claim that he was discriminated against regarding his terms, conditions, location, or privileges of employment. The Court of Appeals decision was proper and reasonable. It takes into account both employees need for protection from retaliation, and also employers responsibility to make valid employment decisions. This Court should uphold the Court of Appeals reasonable decision.

FACTS

Mr. Smith alleges that the City of Flint violated the Whistleblower Protection Act ("WPA"), by reassigning him from his position as union president to his previous post, patrol officer. The City argued that this was not an adverse employment action, because the decision to reassign him was pursuant to a modification of the collective bargaining agreement ("CBA") between the City of Flint and the Flint Police Officer's Association ("FPOA"). The Trial Court agreed. See **Exhibit A - Order Granting Defendant's Motion for Summary Disposition filed January 27, 2014.**

The Court of Appeals apparently agreed as well. **See Exhibit B - Order Granting Plaintiff's Motion for Immediate Consideration and Denying Leave to Appeal filed April 28, 2014.** This Court remanded the case and directed the Court of Appeals to "specifically address whether the plaintiff has stated a claim that he suffered discrimination regarding his terms, conditions, location, or privileges of employment." **See Exhibit C - Order filed December 10, 2014.** The Court of Appeals did so, and issued an opinion finding that Mr. Smith had not stated a claim that suffered the complained of discrimination. **See Exhibit D – Nov 5, 2015 COA Opinion.**

On April 24, 2012, then-appointed City of Flint Emergency Manager, Michael Brown, issued an order modifying the CBA between the City of Flint and the FPOA. State Treasurer Andy Dillon approved this order pursuant to Public Act 4 (the Local Government and School District Fiscal Accountability Act) of 2011. One of these modifications was the elimination of Article 4 of the former CBA, which provided for a full-time union president. At the time of the order, Plaintiff FPD Officer Smith was serving as the union president. He was reassigned to the job duties he was hired to perform, that is, to serve as a patrol officer. This lawsuit, filed over a year later, seeks to challenge that action, claiming that Emergency Manager Brown retaliated against Mr. Smith by eliminating the union president position in violation of the WPA.

STANDARD OF REVIEW

"Appellate review of a motion for summary disposition is *de novo*. MCR 2.116(C)(8) tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted. *Spiek v Dep't of Transportation* 456 Mich 331, 337; 572 NW2d 201, 204 (1998). "A motion under MCR 2.116(C)(8) should be granted if the pleadings fail to state a claim as a matter of law, and no factual development could justify recovery." *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424; 751 NW2d 8, 11 (2008).

Likewise, a trial court's interpretation of a statute is reviewed de novo. *Rowland v Washtenaw County Road Commission*, 477 Mich 197 (2007). If the statute is unambiguous on its face, the Legislature will be presumed to have intended the meaning expressed, and judicial construction is neither required nor permissible. *Id* at 202.

ARGUMENT

I. Plaintiff-Appellant Smith did not state a claim that he suffered discrimination regarding his terms conditions, location, or privileges of employment.

Rule Explanation:

The WPA provides, in relevant part:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action. MCL § 15.362.

To state a claim for retaliation under the WPA, a plaintiff must show that (1) the plaintiff was engaged in a protected activity under the Act; (2) the plaintiff was discharged or discriminated against; and (3) a causal connection exists between the protected activity and the discharge. *Chandler v Dowell Schlumberger Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998). This Court directed the Court of Appeals to address whether the Appellant met the second element of this analysis; specifically, whether he stated a valid claim that he suffered discrimination regarding his terms, conditions, location, or privileges of employment.

To meet that element of a prima facie case, a plaintiff must set forth a discrete employment action which satisfies the legal threshold of an "adverse employment action" that occurred within 90 days of the date of filing his Complaint. Here, Appellant Smith plainly failed to do so. And the Court of Appeals determined that he was not discriminated against regarding his terms, conditions, location, or privileges of employment. **See Exhibit D.** Essentially, Appellant Smith did not suffer a materially

adverse employment action, and his (subjective) opinion that his reassignment was unpleasant is irrelevant. The following case law, as applied by the Court of Appeals is instructive.

The Michigan Court of Appeals has defined an adverse employment action "as an employment decision that is 'materially adverse in that it is more than [a] 'mere inconvenience or an alteration of job responsibilities' and that 'there must be some objective basis for demonstrating that the change is adverse because a 'plaintiff's subjective impressions as to the desirability of one position over another [are] not controlling.'" *Pena v Ingham County Rd Comm'n* 255 Mich App 299, 311 (2003), *Heckmann v Detroit Chief of Police*, 267 Mich App 480, 705 NW2d 689, 697 (Mich Ct App 2005) (overruled on other grounds) (internal quotation marks omitted). Examples of an adverse employment action include termination, reduction in wage or salary, or significantly diminished responsibilities. *Pena* at 312.

Likewise, the United States Sixth Circuit definition of adverse employment is also instructive. The Sixth Circuit defined an adverse employment action as a "materially adverse change in the terms or conditions of . . . employment because of [the] employer's conduct." *Policastro v Northwest Airlines, Inc,* 297 F3d 535, 539 (6th Cir 2002) (citation omitted). Examples of an adverse employment action include termination, reduction in wage or salary, or significantly diminished responsibilities. *Ford v Gen Motors Corp,* 305 F3d 545, 553 (6th Cir 2002). The Sixth Circuit has held that de minimus employment actions such as "[r]eassignments without changes in salary, benefits, title, or work hours usually do not constitute adverse employment

actions." *Policastro*, 297 F3d at 539. See also *Woods v Washtenaw Hills Manor*, Inc, 2009 US Dist. LEXIS 22358, 20-21 (ED Mich Mar 19, 2009).

Moreover, In *Burlington N & Santa Fe Ry Co v White*, 548 US 53 (2006), the Supreme Court held that "[w]hether a particular reassignment is materially adverse depends on the circumstances of the particular case, and should be judged from the perspective of a reasonable person in the plaintiff's position, considering all the circumstances." *Id* at 71. The *Burlington* test was applied in *Walters v Pride Ambulance Co*, 683 F Supp 2d 580 (WD Mich 2010), to determine whether a change in working conditions was adverse action. In *Walters*, after the plaintiff complained about some billing practices, "she was reassigned from collections to dispatch." *Id.* at 590. The plaintiff alleged that the reassignment was adverse action. The court disagreed. It held that plaintiff could not establish that a reasonable person, in her circumstances, would consider the reassignment "materially adverse." The court held that plaintiff's subjective feelings about the transfer are not objective evidence that the transfer constituted an adverse employment action. *Id.*

All that being said, the rule Michigan court's apply in determining whether an adverse employment action has occurred under the WPA is straightforward. A retaliatory action must be materially and objectively adverse. It must be more than a mere inconvenience or alteration of job responsibilities. Moreover, the subjective feelings of the employee do not matter. And, importantly, this is the standard adopted by numerous courts, both in Michigan and at the Federal level. It is a standard that makes sense, and should continue to be adopted by this Court.

Analysis

Based upon the above precedent, the Court of Appeals properly ruled that Appellant Smith failed to state a claim that he was discriminated against regarding his terms, conditions, location, or privileges of employment. In this case, Appellant Smith is essentially complaining about a reassignment. However, his mere subjective impression that this reassignment constitutes an adverse employment action does not control. Instead, Appellant Smith must show an objective basis that the change was adverse. However, as the Court of Appeals agreed, he cannot meet that standard.

The situation before this Court should be juxtaposed against the 6th Circuit's decision in *Ford v Gen Motors Corp.* Appellant Smith was not terminated, he has suffered no reduction in pay or benefits, and is doing exactly the job that he was hired by the City to do. Moreover, he was elected by his Union to be president—not hired by the City. The City is not responsible for his subjective expectation of being FPOA President forever. Ultimately, Appellant Smith's alleged complaint is not complicated. He complains that his job duties went from full time president to the duties he was hired to perform: patrol officer, and that furthermore, he was reassigned to patrol duties in the north end of the City of Flint.

The Court of Appeals properly determined that Appellant Smith had not received an adverse employment action. Generally, a mere reassignment, without a reduction in changes in salary, benefits, title, or work hours there is no adverse employment action.

The requirements of the *Pena* test are not met in light of the facts presented in this case. There has been no materially adverse reassignment, judged from the perspective a reasonable person in Appellant Smith's position, and considering all the

circumstances. And, Appellant Smith's subjective impression that the job reassignment is less appealing does not control. As a result, he has failed to state a claim.

In fact, the situation involved in this case is functionally equivalent to what occurred in *Walters*. In, *Walters,* the plaintiff was reassigned from collections duties to dispatch. Yet the Court of Appeals found this did not constitute an adverse employment action. Here, Appellant Smith is alleging that the change in his job constituted an adverse employment action. But, any change in Appellant Smith's position is even more de minimus, than the change in *Walters.* Appellant Smith's function did not change at all. Instead, it is uncontested that he remains a patrol officer.

And, this fact is very important. Appellant Smith was hired to act as a patrol officer, and his reassignment is not materially different than before. He was simply reassigned from one patrol area in the City, to another patrol area. This is not a materially adverse reassignment. Appellant Smith is a member of law enforcement for the City of Flint, engaged in patrol functions, and his duties have not changed relative to other similarly situated members of law enforcement. Whether his patrol duties take him into the northern, southern, eastern, or western limits of the municipality, his terms, conditions, location, or privileges of employment remain materially the same.

Appellant Smith may counter argue that the location of his employment changed and that conducting patrol duties in the northern portion of the City of Flint is more hazardous than his previous patrol assignment – and that effectively this changes the conditions of his employment. However, this argument has no merit. Law enforcement personnel throughout the State of Michigan face precarious situations daily, with many different types of individuals, regardless of location. This applies equally whether they

perform their duties in Grand Rapids, Charlevoix, Detroit, or Flint. There is simply no way to predict the exact set of circumstances a member of law enforcement will face each day, or the types of suspects with which they will be required to interact. All members of law enforcement equally face this possibility, and are aware of it at the outset of their employment. Judged from the perspective of a reasonable individual in Appellant's position, and considering all the circumstances, the reassignment is not materially adverse. Changing geographic areas of patrol within the geographic parameters of an employer simply does not meet the standard in *Burlington* and Appellant Smith's subjective impression of the situation does not control.

Appellant Smith's Complaint was made untimely.

As a final note, notwithstanding any other legal arguments barring this case, Appellant failed to bring a timely claim. While the Court of Appeals found Appellant Smith did not suffer an adverse employment action, they acknowledged this as well. The EM's Order modifying the FPOA CBA, and thus eliminating Appellant's full time union position, was entered on April 25, 2012 and it was immediately posted on the City's website. There can be no argument that Appellant Smith was not aware of this as the FPOA President. If Appellant Smith believed that this decision was the product of unlawful WPA retaliation, he had 90 days from April 25, 2012 to contest the official action. See MCL 15.363 ("WPA claim must be brought within 90 days after the occurrence of the alleged violation."). He brought his claim on May 31, 2013 – nearly ten months after the 90 day period had elapsed. Thus, his claim is untimely and was properly dismissed.

Response to Appellant Smith's Arguments

At the outset, it is important to mention the scope of this Court's instructions to the Court of Appeals in hearing Appellant Smith's case. This Court ordered the Court of Appeals to examine whether Appellant Smith stated a valid claim that he suffered discrimination regarding his terms, conditions, location, or privileges of employment. That is exactly what the Court of Appeals did. See Exhibit D, Section III. A. And, while the Court of Appeals discussed whether Appellant Smith engaged in "protected activity" it was merely academic, as the holding was already based on the court's determination that Appellant Smith had not suffered an adverse employment action. Thus, many of the arguments put forward by Appellant Smith here are not really at issue, his assertions to the contrary. However, Appellant Smith's makes several arguments that the City will address below.

First, Appellant Smith argues that an adverse employment action need not be an "ultimate employment decision" He states that the Circuit Court erred in so much as finding that to be the correct definition of an adverse action. Fair enough, but if this was error, the Court of Appeals agreed and applied the proper standard set forth by *Pena.* (That is, the material and objective standard). Thus, it is no longer at issue in this case. Moreover, as discussed above, *Pena* is the proper standard. Appellant Smith attempts to deemphasize its applicability by pointing out that the case involved civil rights laws. But, as the Court of Appeals pointed out, the same reasoning has been used in WPA cases such as *Heckmann v Detroit Chief of Police*, 267 Mich App 480, 492; 705 NW2d 689 (2005). Petitoner Smith's argument falls flat. In reality, the material and objective standard is appropriate and should continue to be used by Michigan Courts.

Second, Appellant Smith argues that the Court of Appeals decision's standard is not found in MCL 15.362 and has been rejected by most jurisdictions including the United States Supreme Court. This is not accurate. In fact, there is no gaping hole, or inconsistencies, in the logic of the Court of Appeals. The Court did not adopt the "ultimate employment decision" standard as Appellant Smith would have this Court believe. Essentially, Michigan Courts, the Sixth Circuit, and the US Supreme Court have adopted standards which are similar, but it is not the "ultimate employment decision" standard. Instead, these courts use the *objective and material standard*, which does not take into account the subjective feelings of the employee.

Moreover, the Court of Appeals acknowledged that the "ultimate employment decision" standard was no longer good law. Appellant Smith essentially is arguing that the subjective feelings of an employee do matter, and should factor into the analysis of whether an action was adverse. But that would make almost any complaint made by an employee actionable, and hamstring an employer's ability to make any employment decision regarding an employee who claims to have "blown the whistle." [1] Instead, the material and objective standard strikes a balance between the bright line "ultimate employment decision" and the abstract/subjective adverse action standard Appellant Smith argues for.

Third, Appellant Smith argues that this is a ripe time for this Court to "straighten out the disarray and establish how to interpret MCL 15.362's anti-retaliation language…" Appellant Smith's argument is a mischaracterization of the state of Michigan law. There is no dire state of disarray, despite Appellant Smith's statements to the contrary.

[1] This is especially important in the context of this case. The City of Flint, like all municipalities, must have the ability to send their law enforcement officers where they are needed.

Notably, Appellant Smith points only to a single case, *Wurtz v Beecher Metro Dist*, 495 Mich 242, 251 n 14; 848 NW2d 121 (2014), to support his contention that a state of disarray exists. Appellant Smith's contention is, simply put, hyperbole.

Fifth, Appellant Smith argues that the Court of Appeals' decision imposes a heightened pleading standard on Appellant. As stated above, this section of the Court of Appeals' decision was not the basis for its holding. However, Appellant Smith's assertion also is not accurate. Instead, the Court merely applied the pleading requirements of the Michigan Court Rules and case law. It is not sufficient for a plaintiff to plead mere conclusory statements; they must assert enough facts to put a defendant on notice of the claims against them. And the Court of Appeals acknowledged this, See **Exhibit D, page 6.**

CONCLUSION

The Court of Appeals reached the right result for the right reasons. Because Appellant Smith has failed to demonstrate that he suffered discrimination regarding his terms, conditions, location, or privileges of employment, and failed to do so within the applicable 90-day statute of limitations, this Court should deny the application for leave to appeal. In the alternative, this Court should affirm the decision of the Court of Appeals.

Respectfully Submitted,

CITY OF FLINT

/s/ David B. Roth
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Attorney for Defendant-Appellee

Dated: January 5, 2016

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2016, I filed the foregoing document via ***First Class Mail*** to:

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